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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for Himself and All Others Similarly Situated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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ARGUMENT

Respondents' argument that neither *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101 (1989), nor *Varity Corp. v. Howe,* 116 S. Ct. 1065 (1996), conflicts with the Third Circuit's opinion in *In re Unisys Savings Plan Litig.,* 74 F.3d 420 (3d Cir. 1996), reflects a fundamental misunderstanding of the origins of the "arbitrary and capricious" standard, as applied in *Firestone* to ERISA benefits claims. In any event, this Court's recent opinion in *Varity* alone compels summary reversal of the Court of Appeals.

As *Firestone* makes certain, application of the deferential standard of review to fiduciary decisions affecting ERISA benefits claims derives not from the express language of the statute, as respondents seemingly argue. Rather, in concluding that judicial deference is warranted, the Court in *Firestone* examined both the texture of the statute, *e.g.*, "ERISA abounds with the language and terminology of trust law," *Firestone,* 489 U.S. at 110, and the congressional mandate in the accompanying legislative history. *Id.* ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. § 1101-1114, 'codif[y] and make applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'").[1] The simple question posed in Unisys' Petition is whether the reasoning of *Firestone* should equally apply to the judicial resolution of fiduciary breach claims in general, and fiduciary investment choices in particular.

Although the *Firestone* Court reserved this issue for another day, the Court's reasoning in that opinion, and the authority there cited, compel the conclusion that deference is owed a fiduciary making investment choices as well. According to Justice O'Conner, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id* at 111.[2]

Given the breadth of the *Firestone* opinion, it is quite unremarkable that some lower courts, contrary to the Third Circuit in *Unisys,* have applied *Firestone* to fiduciary breach claims. In *Mahoney v. Board of Trustees,* 973 F.2d 968 (1st Cir. 1992), cited in Unisys' Petition, the First Circuit applied the

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1. *Quoting* H.R. Rep. No. 93-533, p. 11 (1973).

2. For that proposition, the Court in *Firestone* cited to section 187 of the *Restatement (Second) of Trusts. Firestone,* 489 U.S. at 111. As described in Unisys' Petition, the commentary to *Restatement* section 187 extends this discretionary authority to investment decisions. *See* Petition at 8 n.7. Nevertheless, respondents contend that Unisys waived this argument because the Plan is not available to this Court. To respond to that possible concern, Unisys today lodged the Plan with the Clerk of Court. That document, submitted to the Internal Revenue Service as part of the tax qualification process on September 15, 1989, amply demonstrates the discretion enjoyed by the Unisys fiduciaries to make investment choices. *See* Unisys Savings Plan at §§ 4(p), 39(b) and 42.

arbitrary and capricious standard to its review of a fiduciary breach claim, given the trustee's reservation of discretion in the governing plan document. Respondents unavailingly seek to distinguish *Mahoney* on the grounds that *Unisys* "does not involve any balancing of the interests of competing groups of beneficiaries." *See* Brief in Opp. at 6. This argument ignores the indisputable fact that fiduciaries' investment decisions necessarily reflect the balancing of myriad considerations (including the length of the investment and the risk versus the potential reward). In other words, the weighing of these competing and varied considerations, prior to the making of investment choices, is no less entitled to judicial deference than the challenged decision in *Mahoney.* The relevant *Restatement* authority, cited with approval in *Firestone,* compels this conclusion. *See supra* at 2 n.2.[3]

The point is made clear in the Third Circuit's opinion in *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995), *cert. denied,* 116 S. Ct. 917 (1996). In sweeping language, the Third Circuit there held, contrary to its ruling in *Unisys,* that *Firestone* applies equally to judicial review of a fiduciary's investment decisions. *Moench,* 62 F.3d at 565. Nevertheless, respondents hope to distinguish *Moench* on the grounds that the decision applies only to employee stock ownership plans or "ESOPs." Respondents are wrong. First, the *Moench* court, citing *Firestone,* reached the unassailable conclusion that the deferential standard likely applies to the judicial review of *all* fiduciary breach claims. In other words, "trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed

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3. Stated differently, as this Court recognized the other day, the exercise of discretion is the hallmark of fiduciary activity under ERISA:

> As the Second Circuit has observed, "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration," does a person become a fiduciary under [ERISA] § 3(21)(A).

Lockheed Corp. v. Spink, No. 95-809, 1995 U.S. LEXIS 3717, at * 14-15 (U.S. June 10, 1996)(quoting *Siskind v. Sperry Retirement Program, Unisys,* 47 F.3d 498, 505 (1995)).

pursuant to 29 U.S.C.A. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a)." *Moench,* 62 F.3d at 565.

In any event, the ESOP in *Moench* and the 401(k) savings plan in *Unisys* are largely indistinguishable. As such, there is no principled basis to apply such a deferential standard to the facts in *Moench,* while employing strict scrutiny in *Unisys.* Both the *Unisys* plan and the *Moench* plan are voluntary; neither plan guaranteed a benefit at retirement; and plaintiffs in both suits sought, contrary to the congressional directive, to transform the plans' fiduciaries into the guarantors of the benefits provided under the plans. Read carefully, the plans in *Moench* and *Unisys* share many attributes; hence, the Third Circuit's refusal to apply a deferential standard to these facts evidences the uncertainty in the lower courts and further underscores the need for this Court's review of the *Unisys* opinion.

In stark contrast to *Mahoney* and *Moench,* and consistent with the Third Circuit's *Unisys* opinion, is the Second Circuit's ruling in *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan,* 26 F.3d 360 (2d Cir. 1994). Mindful of respondents' vigorous contention that *Firestone* is properly limited to ERISA benefits claims, the reasoning supporting the Second Circuit's refusal to extend the application of *Firestone* to fiduciary breach claims deserves closer scrutiny. According to that court, *Firestone* applies not to fiduciary breach litigation but only to a "*simple* denial of benefits, over which the plan administrators have discretion." 26 F.3d at 360 (emphasis added). To limit *Firestone's* reach to such "simple" claims ignores both the reality of benefits administration and the indisputable fact that plan documents typically grant fiduciaries discretion over investment decisions such as those at issue here.[4]

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4. The distinction drawn in *John Blair,* between the "simple" benefits claims (where judicial deference is appropriate), and the presumably more complex fiduciary breach claims, is untenable. Benefits claims cannot be so readily categorized as, in fact, such claims often present life and death issues for participants. For example, benefits claims resolved under the arbitrary and capricious standard include litigation brought to challenge plan admin-

In any event, this discussion of conflicting authority in the lower courts may be, at the end of the day, of historical significance only. Again, this Court's recent opinion in *Varity* holds, in no uncertain terms, that the arbitrary and capricious standard applies to fiduciary breach claims. Although the central ruling in *Varity* permits individual fiduciary breach claims under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the Court went on to hold that fiduciaries need not fear an increase in fiduciary breach litigation (with the application of a more stringent standard of review). The arbitrary and capricious standard applies equally to the judicial review of claims raising fiduciary breach issues:

> After all, *Firestone,* which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.

Varity, 116 S. Ct. at 1079. This Court should summarily reverse the Third Circuit on the authority of its intervening decision in *Varity.* If *Varity* does not supply the governing rule of law, this Court should grant Unisys' Petition to resolve this important issue which is the subject of conflicting appellate decisions.

In fact, the procedural posture of this dispute, considered in light of the legal argument Unisys presents, undermines respondents' contention that this Court's review should be deferred until conclusion of a trial on the merits. Application of the deferential standard required by *Firestone* and *Varity* to fiduciary breach litigation will increase the likelihood of summary judgment rulings in favor of fiduciaries (and would exonerate Unisys from these claims to damages without the need for trial). A trial of this matter would subject Unisys to many years of additional litigation (the cost of which *Varity*

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istrators' refusals to extend "experimental" cancer treatments to dying participants. *E.g., Clark v. K-Mart Corp.,* 979 F.2d 965 (3d Cir. 1992); *Holder v. Prudential Ins. Co.,* 951 F.2d 89 (5th Cir. 1992). The Court of Appeals' failure to apply the arbitrary and capricious standard to fiduciary breach claims cannot be justified on the grounds that such claims are somehow more important, and, as such, worthy of a more exacting form of judicial review.

and *Firestone* are calculated to avoid), while affording this Court no additional insights into the purely legal question on the governing scope of review. In sum, given the peculiar nature of the issues raised in Unisys' Petition regarding the appropriateness of applying a deferential standard of review, a standard especially well-suited for application in the summary judgment context, the matter should now be reviewed by this Court and not at the conclusion of a potentially irrelevant and costly trial.

Respectfully submitted,

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